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No. 8566

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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JOHN KALAHAR,

Plaintiff and Respondent

—VS—

SHIRLEY MAY BROWN,

Defendant and Appellant

BRIEF OF APPELLANT

SUMNER J. HATCH

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN KALAHER,

Plaintiff and Respondent

—vs—

SHIRLEY MAY BROWN,

Defendant and Appellant

No. 8566

BRIEF OF APPELLANT

STATEMENT OF THE CASE

On the 9th day of November, 1955, at the intersection of Orchard Drive with 6800 South in Bountiful, Utah, the defendant, after stopping at a stop sign at 6800 South, began to enter Orchard Drive from the west. The plaintiff, proceeding south on Orchard Drive, collided with the automobile driven by the defendant, the point of impact being approximately in the center of the surfaced highway on Orchard Drive, the right front of the plaintiff's automobile striking the left front of defendant's automobile.

The negligence of the defendant is not denied. After trial before the Honorable John F. Wahlquist, witnesses for both sides being heard, the court took the matter under advisement, and later entered findings of fact and conclusions of law, awarding the plaintiff damages in the sum of \$948.24.

The defendant appeals on the single basis that the court erred in failing to find contributory negligence on the part of the plaintiff.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN FAILING TO FIND CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF.

POINT II.

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE WITH REGARD TO CONTRIBUTORY NEGLIGENCE.

ARGUMENT

THE COURT ERRED IN FAILING TO FIND CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF, AND THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE WITH REGARD TO CONTRIBUTORY NEGLIGENCE. (Points I and II.)

The defendant contends that the plaintiff by his own testimony shows that he was contributorily negligent and that his contributory negligence was one of the proximate factors causing the collision.

Plaintiff states on direct examination:

“Q. Now, will you please briefly in your own words briefly tell how the collision took place?

“A. Well, one car came out of the intersection. I was going along on Orchard Drive about 30 miles per hour and it came out so that I couldn't see it. I mean it just happened so quickly I couldn't tell what happened. I collided with one car and it knocked me over into the other cars.” (R.7)

* * *

“Q. Going back a little farther, Mr. Kalaher, do you have a recollection or a judgment of how far your automobile was from the automobile of Mrs. Brown when you first saw it?

“A. About 50 feet.

“Q. And where was Mrs. Brown's automobile when you first saw it?

“A. Right on Orchard Drive.

“Q. Was it—will you go to the board and take a piece of chalk and draw a rectangle indicating the position of Mrs. Brown's automobile when you first saw it?

“A. (Drawing on board.)

“Q. In relation to the drawing there, was the automobile moving?

“A. Yes.

“Q. How long have you been driving, Mr. Kalaher?

“A. Three years.

“Q. Three years from now?

“A. Yes.

“Q. And you testified you were 50 feet from Mrs. Brown’s automobile at the time you first observed it?

“A. Yes, sir.

“Q. And do you have a judgment as to how fast you were going at that time?

“A. Between 25 and 30 miles per hour.

“Q. And do you have a judgment as to how fast Mrs. Brown was driving her automobile at that time?

“A. No, I don’t.

“Q. But your testimony is that it was moving. Is that correct?

“A. Yes, that’s correct.

“Q. Do you recall whether or not your driving headlights were on?

“A. Yes, they were on.

“Q. Did you observe, prior to the collision or any time after, that the lights were on Mrs. Brown’s automobile?

“A. No, I don’t know whether she had her lights on or whether she didn’t.

“Q. Now, at any time prior to the collision and after you first observed Mrs. Brown’s automobile, did you apply your brakes?

“A. I didn’t have time to apply my brakes.

“Q. Did you make an attempt to apply your brakes?

“A. Yes.

“Q. And do you know whether or not your brakes ever took effect?

“A. No, they didn’t take effect.” (R. 8 and 9)

and on cross-examination:

“Q. Do you know where the automobile came from?

“A. Came out of 6800 South, I imagine.

“Q. You didn’t see it come out of 6800?

“A. No, sir.

“Q. It was in the middle of the road when you first saw it?

“A. Yes.

“Q. And it was in substantially the same place when you hit it as when you saw it?

“A. Yes.

“Q. You judge you were going about 30 miles per hour?

“A. Yes, sir.

“Q. And you saw it when you were about 50 feet up the road. Is that correct?

“A. It may have been a little closer than 50 feet.

“Q. And you hadn’t entered the intersection when you saw the automobile, had you?

“A. No.

“Q. Didn’t the automobile move forward at all from the time you saw it and when the collision happened?

“A. Not much.

“Q. Your brakes didn’t have time to take effect. Is that correct?

“A. No.

“Q. You were 50 feet away and traveling 30 miles per hour?

“A. Yes.

“Q. How far is it from your home to 6800 South, your home at the time? If you know.

“A. About a mile and a half or two miles.

“Q. The accident was around four o’clock, wasn’t it?

“A. Close to it.” (R. 13 and 14)

The defendant and appellant contends by the language above set forth Mr. Kalaher shows by his own testimony he was not keeping a proper lookout, the testimony showing that the appellant’s automobile was moving very slowly and was in the middle of the road before the plaintiff observed the car. Had he been keeping a proper lookout, he would have observed the car coming from 6800 South into Orchard Drive at a dis-

tance where he could have stopped or slowed down and avoided defendant's automobile. He further indicates that defendant's automobile was going so slowly it negotiated very few feet, if any distance, while plaintiff at his stated speed of thirty miles per hour was traveling fifty feet.

It is appellant's contention that plaintiff by his own testimony shows he was not keeping a proper lookout and his failure to keep a proper lookout contributed to the cause of the accident, and the court erred in failing to take into consideration his testimony with regard to the contributory negligence of the plaintiff.

CONCLUSION

The defendant and appellant therefore submits that the lower court's decision should be reversed, and judgment entered in favor of defendant and against plaintiff, no cause of action.

Respectfully submitted,

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